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AUG 8 1949
CHARLES ELMORE CROPLEY
CLERK

No. 190

In the Supreme Court of the United States

October Term, 1949.

GLEN S. DILLE, *Petitioner,*

vs.

W. A. DELANEY, JR., ZEPHYR DRILLING COMPANY, A CORPORATION, AND THE CARTER OIL COMPANY, A CORPORATION,

Respondents.

RESPONSE OF THE CARTER OIL COMPANY TO PETITION FOR WRIT OF *CERTIORARI.*

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May It Please the Court:

Because the petition for the writ and the brief in support of it seem to infer that the case at bar was fictitious or collusively brought, this response is filed.

The Carter Oil Company filed this suit in good faith, in a court which its lawyers believed had jurisdiction, to protect its own rights. It did not appeal from the judgment of dismissal, even though it deemed the judgment erroneous, because of the conviction that it is protected by Dille's stipulations and admissions made in open court immediately prior to the dismissal (R. 133-136). After the suit was brought, and until the day it was dismissed, as to all matters included in the stipulation and admissions, Dille

had kept the word of promise to the ear (R. 36-37; 44) only to break it to the hope. Thus, respondent offered to dismiss the complaint if Dille would execute a stipulation tendered him (R. 41). His counsel studiously refrained from any definite commitment (R. 41, 44, 49-50, 59, 60), protested the stipulation was destructive of Dille's rights (R. 59, 60-61), but at the last hearing agreed to everything the stipulation contained (R. 132-136) and its substance was inserted in the order of dismissal (R. 143).

Here are the essential facts out of which the litigation arose:

In March, 1946, admittedly without any notice of Dille's claim, The Carter Oil Company bought from the defendants Delaney and Zephyr Drilling Company an undivided 60% interest in a block of unproven oil and gas leases (of which such defendants were the record owners) for $25,000 cash and an agreement to drill a test well, which was drilled at a cost of some $98,000.00 (R. 3, 4). Under its contract with these two defendants, Carter was the operator of the leases. Up to May, 1948, approximately $1,000,000.00 was spent in development, of which Carter had paid not less than 60%; but the leases were not fully developed and further expenditures were required (R. 6); Carter was purchasing from the leases oil of the value of approximately $156,000.00 per month, and was of course obligated to pay the true owners its value (R. 6); according to its contract, Carter was under the necessity of obtaining consents to various acts performed in development and operation (R. 7), was obliged to pay out the profits of the venture (R. 7); and was entitled to collect 40% of development and operating charges. (R. 7, 11)

In this state of affairs, Dille sued Delaney and Zephyr

Drilling Company in a state court to recover an interest—apparently an undivided one-third interest—in the leases and to partition them, but the complaint in that case is not designated as a part of the record (R. 29), although the amended complaint is here (R. 64). Carter was not a party to the state court litigation (R. 6).

Thereupon this suit was filed. The Carter Oil Company sought an adjudication and declaration of its own rights in these particulars (R. 7-8):

1. That its contract with Delaney and Zephyr be declared to be in full force and binding upon all the defendants.
2. That none of the defendants had the right to partition as against Carter.
3. An adjudication of the proportionate share owned by each defendant in the 40% interest in the leases.
4. The respective rights of each defendant in oil produced from the leases.
5. The respective liability of each defendant for further development and operation costs.
6. An adjudication that Delaney and Zephyr might give all consents required to be obtained by Carter under its contract.
7. General equitable relief.

As to each of these, Carter stood alone in its own interest, and could not be aligned with any defendant.

Surely no extended argument is required to demonstrate that Carter needed such adjudications for its own protection, especially when the size of the venture and the amount of expenditures are considered. Oil purchases alone were running at the rate of $156,000.00 per month, and if Dille was entitled to receive a part thereof—perhaps as much as one-

third—Carter was entitled to know it, rather than to proceed at its own risk in paying for the oil. It will not do to say that Carter misjudged Dille's claim. In the first place, the original petition is omitted from this record. In the second place, even the trial judge was not certain of the nature of the claim asserted by Dille (R. 129), and said (R. 130):

> "Now, I suggested in sending out notice that counsel for the various parties be present here today and also requested that Mr. Dille be present because I concluded that there was no reason for me to speculate with respect to the claim being asserted by Dille through his counsel in the District Court of Garvin County. I can see no reason why I cannot call on him to tell me just what is—what claim he makes there and whether or not he asserts that he is now entitled to be paid any part of the proceeds from this oil so that I may be reasonably certain as to whether there is an existing controversy between Dille and the Carter Oil Company."

Then followed the hearing above referred to, in which questions were propounded to and answered by counsel for Dille and by Dille himself (R. 130-136, 141), the result being that Dille agreed to the stipulation he had theretofore refrained from agreeing to (R. 135).

We submit, therefore, that The Carter Oil Company's complaint did present a justiciable controversy. It presented questions which the trial judge was unwilling to decide from a mere inspection of the papers. It presented questions upon which parol evidence was heard, for that is the result of the hearing held. In effect, the case was tried on the merits. See order dismissing case (R. 143-145).

Carter was not a party to the state court suit. As a practical matter, since the defendants were contesting that court's jurisdiction (R. 34, 39), it would have been unwise

for Carter to have intervened in that case. And legally, it had the right to resort to the Federal Courts.

"The right of a plaintiff to choose a Federal Court where there is a choice cannot be properly denied." A plaintiff may not "be forbidden to try the facts upon which his right to relief is based before a court of his choice, if otherwise competent." (*Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 383; *K. C. S. Ry. Co.* v. *Cornish*, (C. C. A. 10) 65 F. (2d) 671, *acc.*); "he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action." (*Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819); "and it makes no difference what his motive may be in electing to invoke federal jurisdiction." (*Sias* v. *Johnson*, (C. C. A. 6) 86 F. (2d) 766.)

Each defendant was interested in establishing or maintaining his claimed interest in these properties. Concerning this dispute, as such, Carter was impartial, for it did not care whether one, or two, or all three defendants owned the 40% interest in the leases and the oil produced from them, nor did it care in what proportions such interest was owned. But since it was the operator of the properties and the purchaser of the oil produced from them, Carter needed, for its own protection, and adjudication of these matters and of its right under the contract. There was a justiciable controversy between Carter on the one side and the three defendants on the other, of which the trial court had jurisdiction.

—*Rex* v. *International Harvester Co.*, (C. C. A. 5) 107 F. (2d) 767;

Maryland Casualty Co. v. *Glassell-Taylor & Robinson*, (C. C. A. 5) 156 F. (2d) 519;

Hunter v. *Federal L. Ins. Co.*, (C. C. A. 8) 111 F. (2d) 551;

Mallers v. *Equitable Life Assur. Soc.*, (C. C. A. 7) 87 F. (2d) 233;

Henderson v. *Plymouth Oil Co.*, (C. C. A. 3) 19 F. (2d) 97;

McComb v. *McCormack*, (C. C. A. 5) 159 F. (2d) 225.

Jurisdiction is to be determined by reference to the allegations of the complaint (*Utah Fuel Co.* v. *National Bituminus Coal Commission*, 306 U. S. 56, 60, 83 L. ed. 483, 487; *Hillsborough Township* v. *Cromwell*, 326 U. S. 620, 90 L. ed. 358) and of course a court's jurisdiction is not destroyed by a defendant's confession of the allegations made against him (*Matter of Reisenberg*, 208 U. S. 90, 107-108, 52 L. ed. 403, 411), nor by his denial of such allegations (2 Moore's Fed. Practice, 2nd Ed., p. 397).

We trust that this is sufficient to establish that the complaint was not wholly without merit and that it was filed in good faith.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that on the ..... day of ....., 1949, I served a copy of the within brief upon the following:

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they being attorneys of record for the petitioner and respondents herein, other than The Carter Oil Company.

This ..... day of ....., 1949.

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